No. 05-__ 05-579 NOV 11 2005

In The
Supreme Court of the United States

LOLA HITHON,

Petitioner,

v.

TYSON FOODS, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances, if any, may a plaintiff establish the existence of invidious discrimination in employment by adducing evidence that he or she was better qualified than the individual selected for a disputed position?*

* The same question is presented in *Ash v. Tyson Foods, Inc.*, No. 05-379 and *Higgins v. Tyson Foods, Inc.*, No. 05-535.

LIST OF PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lola Hithon respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 3, 2005.

OPINIONS BELOW

The August 3, 2005, opinion of the court of appeals, which is reported at 144 Fed. Appx. 795, 11th Cir. (2005), is set out at pp. 1a-9a of the Appendix. The July 23, 2004, memorandum decision of the district court, which is not officially reported, is set out at pp. 10a-20a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 3, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

STATEMENT OF THE CASE

This case concerns a promotion decision that was made in the summer of 2000 to the position of Complex Human Resources Manager at the Oxford, Alabama regional (complex) office of Tyson Foods. The vacancy and promotion at issue are the same as the vacancy and promotion in dispute in *Higgins v. Tyson's Foods, Inc.*, No. 05-5104. At the time petitioner, Lola Hithon, an African American female and 40 years of age, was a managerial employee in human resources at the plant level. The position was ultimately awarded to Lisa Burdick, white female and 28 years of age. Plaintiff sued alleging discrimination on the basis of her race and retaliation.

After a period of discovery, Tyson moved for summary judgment stating Hithon must "adduce evidence that **the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face**."

(Doc. 43, pp. 23-24) (bold and underline in original). Tyson relied on Eleventh and Fifth Circuit case law.[1] Hithon, in her opposition, submitted evidence on a range of evidence, but most important was evidence regarding whether Hithon clearly was better qualified than Burdick and whether Burdick even met the minimum qualifications for the position.

In the evidence submitted to the district court was an extensive list of Hithon's job duties and responsibilities compared to those of Burdick during their respective tenure with Tyson. Hithon also relied on the job posting for the human resource position which provided the minimum qualifications. (Doc. 44, Ex. F, Pls. Exs. 5, 7). Hithon exceeded the minimum qualifications (Doc. 44, Ex. F, p. 105) and Burdick, did not even minimally meet the established criteria.[2] Hithon contended that her eleven years of management experience with Tyson, five years of exclusive management experience in the field of Human Resources (Doc. 61, pp. 4-5, 11-13) exceeded Burdick's four years[3] of seniority and one and one-half years of managerial experience in the field.

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[1] *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (emphasis added) *citing Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001); *quoting Lee v. GTE Florida Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000); *accord, Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339-40 (11th Cir. 2000) (all *quoting Deines v. Texas Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 280 (5th Cir. 1999)).

[2] Allan Trotter, Complex Human Resource manager, testified that the Complex position requires three to five years of management experience not merely time with the company. (Doc. 44, Ex. F, pp. 5, 61-64).

[3] Burdick had worked as a part-time student with Tyson for four years while attending college. (Doc. 44, Ex. F, Pls. Exs. 1, 3, 4).

There was also substantial evidence that Burdick did not meet the written job qualifications. The job posting provided by John Pittard, the white decisionmaker, required three to five years of experience which Allan Trotter stated reflected years of managerial experience, not years of service with Tyson. (Doc. 44, Ex. F, pp. 60-61). Later, Trotter stated the three to five years should be human resource experience. Burdick had less than three years of regular management experience at Tyson. There was a dispute as to whether Burdick could also be credited for her additional experience as a mere trainee. (Doc. 44, Ex. F, pp. 130-131). Ideally, Trotter testified, "you want a candidate with more qualifications than the minimum level." (Doc. 44, Ex. F, p. 129).

Hithon cited to numerous inconsistencies in Tyson's articulated reason for the promotion decision. Tyson contended that factors other than experience and seniority were considered in ascertaining qualifications between the two candidates. For instance, John Pittard, the white decisionmaker, stated that Burdick's references were stronger but admitted he did not seek references for Hithon. (Doc. 44, Ex. C, pp. 136-137). Other managers were only asked for a reference *after* Pittard announced Burdick was the successful candidate. (Doc. 44, Ex. F, pp. 97-99, 131; Ex. C, pp. 55-58, 136). Pittard stated he picked Burdick in part because she would relocate, but Pittard never asked Hithon if she would relocate, but rather assumed Hithon would not. (Doc. 44, Ex. C, pp. 139, 141, 144-148, 320). Relocation was also not a requirement for the position. (Doc. 44, Ex. C, p. 287). Pittard agreed and rated Hithon as having more overall human resource experience than Burdick. (Doc. 44, Ex. C, pp. 162-163).

The district court granted the defendant's motion for summary judgment holding that Tyson's additional subjective criterion, Burdick's college education,[4] and her implementation of a corporate retention program[5] supported Tyson's subjective judgment "that these qualifications counted for more than Hithon's experience." (18a, 19a).

Hithon appealed to the Eleventh Circuit Court of Appeals arguing her qualifications exceeded Burdick's for the human resource promotion in question. Tyson contended that Hithon's lack of a college degree, and perceived inability to relocate, made Burdick the superior candidate over Hithon's greater human resource experience. (Brief of Defendant-Appellee, Tyson Foods, Inc., pp. 44-45). "Any evidence that Hithon might highlight to attempt to establish that she was more qualified than Burdick is far from being 'so apparent as virtually to jump off the page and slap you in its face,' as required by the Eleventh Circuit to show pretext." (Brief of Defendant-Appellee, Tyson Foods, Inc., p. 46).

> "In a failure to promote case . . . a plaintiff cannot prove pretext by simply arguing or even by showing that [he] was better qualified than the [person] who received the position [he] coveted." *Alexander v. Fulton Co., Ga.*, 207 F.3d 1303 (11th Cir. 2000). "Rather, [the plaintiff] must adduce evidence that **the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face'**." *Cofield v.*

[4] A college degree was not a requirement for the position. (Doc. 44, Ex. C, pp. 144-145). Pittard had promoted white individuals within Tyson without a college degree. (Doc. 44, Ex. C, pp. 145-146).

[5] Pittard, the white decisionmaker, testified he could not remember any of the programs Burdick had implemented. (Doc. 44, Ex. C, p. 121).

> *Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (emphasis added) (*citing Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001)) (*quoting Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000); *accord, Alexander*, 207 F.3d at 1339-40) (all *quoting Deines v. Texas Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 280 (5th Cir. 1999)). For the discrepancies to "jump off the page and slap you in the face," they must be of such weight and significance that no reasonable person could have chosen the other candidate over the plaintiff. *Lee*, 226 F.3d at 1254.

(Brief of Defendant-Appellee, Tyson Foods, Inc., pp. 39-40) (bold in original).

Tyson correctly treated the Eleventh Circuit's "slap in the face" standard as equivalent to the Eleventh Circuit's alternative formulation that the differences in qualifications must be "of such weight and significance that no reasonable person could have chosen the other candidate over the plaintiff."

The Eleventh Circuit affirmed the district court's order and relied on *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000). In rejecting Petitioner's evidence that she was better qualified than the white applicant who got the job, the Eleventh Circuit held that the disparity in qualifications was not "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over Hithon" for the job in question. (9a).

REASON FOR GRANTING THE WRIT

THERE IS A WIDESPREAD CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHEN, OR INDEED WHETHER, EVIDENCE REGARDING COMPARATIVE QUALIFICATIONS CAN BE UTILIZED TO PROVE INVIDIOUS DISCRIMINATION IN EMPLOYMENT

This case concerns the same legal issue and standard raised by the pending petitions for writ of certiorari in *Ash v. Tyson Foods, Inc.*, No. 05-378, and *Higgins v. Tyson Foods, Inc.*, No. 05-535.[6] In *Ash* and *Higgins* the Eleventh Circuit applied its rule that a discrimination plaintiff cannot rely on evidence that he or she was more qualified than the individual selected unless the disparity in qualifications is so great as to "jump off the page and slap you in the face." *Ash v. Tyson Foods, Inc.*, No. 05-378, 7a; *Higgins v. Tyson Foods, Inc.*, No. 05-535, 103a. The petitions in *Ash* and *Higgins* described the important and well-established inter-circuit conflict re-garding that issue.

In the instant case the Eleventh Circuit applied an alternative phrasing of the same standard. Hithon's evidence of her superior qualifications was held insufficient because the disparity in qualifications was not "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over Hithon" for the job in question. (9a).

The Eleventh Circuit has repeatedly explained that this "no reasonable person" standard is exactly the same as its "slap in the face" standard.

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[6] The respondent and its counsel are the same in *Higgins* and the instant case.

> For the discrepancies to "jump off the page and slap you in the face," they must be of such weight and significance that no reasonable person could have chosen [the person who got the job] over [the plaintiff].

Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1090 (11th Cir. 2004); *Stuart v. Jefferson County Department of Human Resources*, 2005 WL 2456420 at *3 (11th Cir., Oct. 6, 2005) (quoting *Wilson*).

In a series of decisions, the Eleventh Circuit has quoted and endorsed a leading Fifth Circuit decision holding that these two formulations are equivalent. *Deines v. Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277 (5th Cir. 1999).

> In *Deines* . . . the Fifth Circuit [held] that: "disparities in qualification are not enough in and of themselves to demonstrate discriminatory intent unless those disparities as so apparent as virtually to jump off the page and slap you in the face." 164 F.3d at 280. The court explained that the phrase "jump off the page and slap you in the face" "should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."

Alexander v. Fulton County, Georgia, 207 F.3d 1303, 1340 (11th Cir. 2000); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000) (quoting *Deines*); *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (quoting *Lee* quoting *Deines*).

This repeatedly stated equivalence makes clear why the Eleventh (and Fifth) Circuit standard has proven in practice to be impossible to satisfy. To require a plaintiff to show that "no reasonable person, in the exercise of impartial judgement" could have promoted (or hired) the competing applicant is to insist that the plaintiff demonstrate that the employer's actions would fail the rational basis test. That is a requirement which no plaintiff in the Eleventh Circuit has ever been able to satisfy. Every employment discrimination defendant insists it picked the best candidate, and no employer would be so foolish as to give an explanation so utterly bizarre that a court would label it irrational.

The use of this "no reasonable person" standard (like its equivalent, the "slap in the face" standard) for determining the sufficiency of evidence of racial discrimination is inconsistent with the repeated decisions of this Court that the rational basis test is entirely different from, and requires a far more compelling showing than, the requirement – embodied in Title VII and the Equal Protection Clause – that a plaintiff demonstrate that a disputed action was motivated by an impermissible consideration. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 370-71 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83-84 (2000).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 04-13887 and 05-10184
Non-Argument Calendar

D.C. Docket No. 02-01835-CV-AR-M

LOLA HITHON,

Plaintiff-Appellee,

versus

TYSON FOODS, INC.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Alabama

(August 3, 2005)

Before BLACK, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Appellant, Lola Hithon, appeals the district court's grant of summary judgment for Tyson Foods, Inc. in her employment discrimination suit. Hithon sued her employer, Tyson Foods, Inc., ("Tyson"), for race discrimination in violation of 42 U.S.C. § 1981 for its failure to promote her to two different human resources managerial positions. Hithon also claims that she was retaliated against

for her involvement in a lawsuit brought against Tyson in which Hithon's husband was a party. Finding no error, we affirm the district court's ruling.

A. Background

Hithon, an African American, began her employment at Tyson on July 1, 1985 as an hourly saw operator. Since 1987, she has held various positions with Tyson. These positions include the following: accounting clerk, front-line supervisor, retention supervisor, plant facilitator, employment supervisor, shift personnel manager, plant coordinator, shipping superintendent, shift manager, and plant personnel manager. Over the years, Hithon's performance has been exemplary and without disciplinary action.

Tyson organizes its Alabama operations into three "complexes": Albertville, Oxford, and Snead. Each of these complexes is run by a complex manager who has final authority and is the final decision-maker over the complex and its subordinate facilities. All of Hithon's employment with Tyson has been at the Gadsden processing plant which is the subordinate facility in the Snead complex. During the relevant time period, Ricky Walters was the complex manager of Albertville, and John Pittard was the Oxford complex manager.

In February 2000, Hithon applied for the position of complex human resources manager for the Albertville complex. This position became available when Jerry Phillips, a Caucasian employee, resigned. Although Tyson had a policy of promoting from within the company, Phillips was awarded the position when he announced that he desired to return to work at Tyson. Phillips was

placed back into his previous position on February 21, 2000.

In July 2000, Hithon applied for the position of complex human resource manager for the Oxford complex. Pittard posted the opening and interviewed Hithon and three other candidates, two of whom were also African American. The interview process for this position included a ranking of each candidate by Pittard. The six areas in which the candidates were ranked was as follows: education, human resources manager experience, total human resources experience, references, community involvement, willingness to relocate, motivation, presence, and relationship with the union. Pittard's first choice for the vacant position was Jacinta Carter, an African American employee; however, she declined this position and accepted a position as the Human resources manager for the Pine Bluff, Arkansas complex.

Lisa Burdick, a Caucasian employee, was Pittard's second choice to fill this position. Burdick, a college graduate, was the human resources manager of the Ashland facility at the time she applied for the Oxford position and had held that position since December 1998. In contrast, Hithon had only been the human resources manager of the Gadsden facility since March 1999 and had not obtained a college degree. Burdick accepted the Oxford position in July 2000.

On July 25, 2000, Hithon began the process of filing a formal grievance with Tyson. According to the grievance, Hithon disagreed with Pittard's ranking of the candidates and his ultimate selection of Burdick. Hithon also claims that immediately following her interview for the position, Pittard questioned another employee about the suit

brought by Hithon's husband against Tyson alleging race discrimination. Further, Hithon complained that Pittard's choosing Burdick for the position was a decision motivated by race.

Hithon bases her discrimination claim on the denial of two promotions: (1) Phillips's reinstatement to the Albertville human resources management position and (2) Carter's and ultimately Burdick's promotion to the Oxford human resources management position. Hithon also claims retaliation based on the denial of a promotion to the Oxford position.

On appeal, Hithon argues that the district court erred in granting summary judgment in favor of Tyson. We review the district court's grant of summary judgment *de novo*, applying the same standards used by the district court. *Killinger v. Samford Univ.*, 113 F.3d 196, 198 (11th Cir. 1997). Summary judgment is appropriate when "there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). In examining the record, we review the evidence in the light most favorable to the non-moving party. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004).

B. Hithon's 42 U.S.C. § 1981 Claims Regarding the Albertville Position

Notwithstanding the Supreme Court's recent *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369 (2004) decision, we hold that Hithon's § 1981 claims regarding the denial of the Albertville position are time-barred by the Alabama statute of limitations. The Supreme Court in *Jones* stated that Congress's 1990 enactment of 28 U.S.C. § 1658, which created a default four-year statute of limitations for

federal causes of action created after that date, changed the limitations period for some claims under § 1981 to four years. *Id.* at 378-79. Additionally, the Court held that to the extent that the Civil Rights Act of 1991 created new causes of action not previously cognizable under § 1981, such claims were subject to the "catch-all" statute of limitations of § 1658. *Id.* at 381-82. This changed prior Supreme Court precedent as set forth in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987). In that case, the Court held that in order to determine the proper statute of limitations, federal courts were to apply the most analogous state statute of limitations to § 1981 claims, which in this case, would be two years under Alabama law.

Congress amended § 1981 in 1990 to include a cause of action for discrimination in the terms and conditions of employment as well as discrimination in the making and enforcement of contracts. *See* 42 U.S.C. § 1981. Therefore, it is necessary to determine whether Hithon's claims were cognizable before the effective date of the four-year "catch-all" statute of limitations under § 1658. If so, then her claims would be time-barred under *Goodman*.

Hithon argues that her claims are governed by § 1658 and thus not time-barred. Section 1658 provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a). Section 1658 was enacted on December 1, 1990. Therefore, Hithon's claims are subject to the four-year statute of limitations if they arose under an Act of Congress enacted after that date.

We find that Hithon's § 1981 claims were cognizable under *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 82 (1989), which applied to § 1981 before the amendments contained in the Civil Rights Act of 1991. Under *Patterson*, a failure to promote claim was actionable under § 1981 if the promotion "rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* at 185. Hithon claims that she was denied a promotion for an [sic] human resources manager position because of her race. We find that these promotions rise "to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* at 185. Therefore, Hithon's failure to promote claims were cognizable before Congress's 1991 expansion of § 1981 and thus remain subject to the Alabama two-year statute of limitations as mandated by *Goodman*.

C. Timeliness of Hithon's Title VII Claims Regarding the Albertville Position

We find that Hithon filed her Equal Employment Opportunity Commission ("EEOC") complaint more than ten months after Phillips returned to the Albertville Human Resources position for which Hithon applied. Charges regarding alleged discriminatory acts must be filed within 180 days of the alleged act. 42 U.S.C. § 2000e-5(e)(1). Although Hithon notes this argument in her statement of the issues, she makes no legal argument and provides no analysis in her brief regarding the timeliness of her Title VII claim. We therefore deem this issue abandoned on appeal. *See Sepulveda v. United States*, 401 F.3d

1226, 1228 n.2 (11th Cir. 2005).[1] Thus, we hold that Hithon's § 1981 and Title VII retaliation claims based on the denial of the promotion for the Albertville position are time-barred. Accordingly, we affirm the district court's holding on these issues.

D. Hithon's Claims Arising from Oxford Position

We now turn to the merits of Hithon's discrimination and retaliation claims based on the denial of the Oxford promotion. Hithon fails to establish a prima facie case for retaliation or discrimination with regard to the Oxford human resources manager position.

In order to prevail on a discriminatory failure to promote claim, a plaintiff must establish the following: (1) she is a member of a protected class; (2) she was qualified and applied for the promotion; (3) she was rejected despite her qualifications; and (4) other equally or less qualified employees who were not members of the protected class were promoted. *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000). Hithon proves the first three elements necessary to establish a prima facie case of

[1] Hithon stated several others issues in her brief but made no legal argument and provided no analysis as to these issues. Thus, the following issues are deemed abandoned: "whether the trial court erred to reversal in granting the defendant's motion to strike the affidavit of Melody Lloyd; whether the trial court erred to reversal in finding that plaintiff had not identified any practice through statistics or otherwise to support her disparate impact claim; and whether the trial court erred to reversal in not considering the case *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003) as controlling in establishing plaintiff's prima facie case and rebutting defendant's articulated reasons for termination." *See Sepulveda v. United States*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005)

discrimination. However, she did not show that an equally or less qualified employee who was not in her protected class was promoted to the position. First, Burdick, the employee who was finally placed in the Oxford position was more qualified than Hithon. Burdick had a four-year college degree and had more experience as a plant manager than did Hithon. Additionally, the record reflects that Burdick successfully implemented a new managerial program aimed to improve effectiveness and efficiency.

As for her retaliation claims, in order to succeed Hithon must show that "(1) [s]he engaged in protected activity; (2) [s]he suffered an adverse employment action; and (3) there was a causal link between h[er] protected activity and the adverse employment action." *Bass v. Bd. of County Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1117 (11th Cir. 2001).

In analyzing Hithon's retaliation claim, Hithon claims that the protected activity in which she engaged was that of her husband's lawsuit against Tyson. We have not directly addressed whether a Plaintiff, who works with a close relative who engaged in statutorily-protected activity, is entitled to bring a retaliation claim. We note that the Third, Fifth and Eighth Circuits have previously addressed this issue. Those Circuits have held that a plaintiff may not bring an action for a retaliation claim without personally participating in the protected activity. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-70 (3rd Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226-27 (5th Cir. 1996); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998). Hithon did not personally participate in her husband's retaliation claim. Yet, we need not decide this issue today. Assuming arguendo that Hithon has met her burden of establishing a prima facie

case for discrimination and retaliation, for both claims, we apply the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). The burden shifts to Tyson to produce a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Given Burdick's superior credentials and qualifications, Tyson has satisfied this burden. Every member of the review panel ranked Hithon last out of the candidates considered for the position.

Because Tyson produced a legitimate, non-discriminatory reason for Hithon's adverse employment decision, the burden then shifts back to Hithon to prove that Tyson's reasons were pretextual. *Id.* at 804. Hithon fails to meet this burden as well. Hithon has not provided the quantum of evidence necessary to establish that Tyson's legitimate, race-neutral reasons were pretextual. Hithon does argue that she was more qualified than Burdick. Although a disparity in qualifications could support an inference of discrimination, reviewing the record as a whole, Hithon has failed to establish a qualification disparity of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over Hithon for the Oxford job.

For the foregoing reasons, we affirm the district court's grant of summary judgment to Tyson.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

LOLA HITHON,	)	
Plaintiff,	)	CIVIL ACTION NO. 02-AR-1835-M
v.	)	
TYSON FOODS, INC.	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed July 23, 2004)

Before the court is the motion for summary judgment (Dkt. #42) and evidentiary submissions filed on April 16, 2004 by defendant, Tyson Foods, Inc. ("Tyson"). The complaint of plaintiff, Lola Hithon ("Hithon"), contains nine counts: (1) race discrimination in violation of Title VII with respect to "a promotion and raise she sought, but was treated less favorably and paid less in comparison to her white co-workers due to her race"; (2) race discrimination in violation of 42 U.S.C. § 1981 with respect to "the promotions and pay raises she sought and was wrongfully denied the promotions"; (3) disparate impact in violation of Title VII and 42 U.S.C. § 1981; (4) disparate treatment in violation of Title VII and 42 U.S.C. § 1981 in that "[b]lack employees are treated less favorably and paid less in comparison to their white co-workers and due to their race"; (5) intentional infliction of emotional distress under Alabama law; (6) negligent hiring, training, supervision, and retention under Alabama law; (7) breach of contract under Alabama law; (8) retaliation in violation of "28 [*sic*] U.S.C. Section 2000e *et seq.*"; and (9) breach of implied

covenant of good faith and fair dealing under Alabama law. *See* Dkt. #22.[1] Tyson moves for summary judgment on all counts.

Tyson's Motion to Strike

Included within Hithon's evidentiary submissions is the affidavit of Melody Lloyd. (Dkt. #60, Ex.2). Lloyd's affidavit attributes a discriminatory statement to John Pittard, the Tyson supervisor who decided not to promote Hithon in July 2000. Tyson moves to strike the Lloyd affidavit because: Lloyd has never been disclosed as a fact witness pursuant to Rule 26, F.R.Civ.P.; Lloyd's affidavit contains inadmissible hearsay; and Lloyd's affidavit is not notarized. The motion to strike is due to be granted.

The discovery deadline in this action was January 26, 2004. Hithon's disclosure of Lloyd follows Tyson's motion for summary judgment and comes after all discovery deadlines have passed. Tyson's ability to depose Lloyd is non-existent. Additionally, Hithon offers as proof of a matter at issue a statement allegedly made by Pittard to another employee, Lloyd, who purports to have learned of Pittard's statement from yet another employee, Lisa Burdick. This is the grossest form of hearsay and is due to be excluded. Tyson's final argument is without merit. Lloyd's affidavit does substantially comport with the requirements of 28 U.S.C. § 1746(2). Consequently, it

[1] In Hithon's opposition brief, she concedes counts 5, 7,and 9. She characterizes her action as arising "out of two primary events: 1) the denial of a promotion to the Albertville Complex Human Resource Manager position in February 2000; and 2) the denial of a promotion to the Oxford Complex Human Resource Manager in July 2000." (Dkt. #61 at 2).

would not have needed to be notarized, even though it has now been notarized. The notarization added nothing.

The court will strike the affidavit by separate order.

Summary-Judgment Facts

Hithon, who is black, began her employment at Tyson on July 1, 1985 as an hourly saw operator. Since 1987 she has held various positions including accounting clerk, front-line supervisor, retention supervisor, plant facilitator, employment supervisor, shift personnel manager, plant coordinator, shipping superintendent, shift manager, and plant personnel manager. Hithon's performance has been exemplary and without disciplinary action.

All of Hithon's employment with Tyson has been at Tyson's Gadsden processing plant. Tyson organizes its Alabama operations into three "complexes": Albertville, Oxford, and Snead. Each complex is run by a complex manager who has final authority and is the final decision-maker over the complex and its subordinate facilities. The Gadsden plant is a subordinate facility in the Snead complex. During the relevant time period, the Albertville complex manager was Ricky Walker, who is white, and the Oxford complex manager was John Pittard, who is white.

In February 2000, Hithon applied for the position of complex human-resources manager for the Albertville complex (the "Albertville position"). The position opened when Jerry Phillips, who is white, resigned. Although Tyson has a policy of promoting from within the company, Phillips was awarded the position when he announced that he desired to return. Phillips was placed back into the position on February 21, 2000.

In July 2000, Hithon applied for the position of complex human-resource manager for the Oxford complex (the "Oxford position"). Pittard posted the opening and interviewed Hithon and three other candidates: Ever Higgins, who is black; Jacinta Carter, who is black; and Lisa Burdick, who is white. Pittard ranked the candidates in six areas: education, HR manager experience, total HR experience, references, community involvement, willingness to relocate, motivation, presence, and relationship with the union.[2] Pittard's first choice was Carter, but she declined the position. Instead, Carter accepted the position of human-resource manager for the Pine Bluff, Arkansas complex.

Burdick was Pittard's second choice. Burdick was the human-resources manager of the Ashland facility at the time she applied. She had been in that position since December 1998 and had successfully implemented Tyson's "RISE" program at that facility.[3] Additionally, Burdick had a college degree. Hithon had served as the human-resources manager of the Gadsden facility since March 1999 and only had some college. Pittard offered the position to Burdick in late July 2000. She accepted.

On July 25, 2000, Hithon began the process of filing a formal grievance.[4] Hithon disagreed with Pittard's ranking

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[2] Tyson reproduces Pittard's decision matrix in its briefs. (Dkt. #43 at 11 & Dkt. #65 at 10).

[3] RISE "was a program put in to help work turnover and control costs through overtime reduction." Burdick took the idea behind the policy, created and implemented a program for the Ashland facility that resulted in a dramatic reduction in turnover rate.

[4] Tyson established a four-person review panel and hired an independent consulting firm to oversee the review. The panel affirmed Pittard's selection of Burdick for the Oxford position three to one – the

(Continued on following page)

of the candidates and his ultimate selection, Burdick. She further complained that immediately following her interview for the position, Pittard questioned another employee about the trial of a case that had been brought by Hithon's husband and another man named Ashe against Tyson alleging race discrimination. Hithon believed, and alleges, that Pittard's selection was racially motivated.

Summary-Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986); *Allen v. Tyson Foods,* 121 F.3d 642, 646 (11th Cir.1997). An issue is "genuine" if the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party. *Id.* On a motion for summary judgment, the court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to the nonmoving party, and determine whether that evidence could reasonably sustain a jury verdict. *Celotex,* 477 U.S. at 322-23; *Allen*, 121 F.3d at 646. The court cannot make credibility determinations, weigh the evidence or draw inferences from the evidence. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

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one black panelist concluded that Higgins was the best candidate. All four panelists ranked Hithon last.

The moving party bears the burden of informing the court of the basis for its motion and demonstrating the "absence of evidence on an essential element of the non-moving party's case." *Celotex Corp.*, 477 U.S. at 323, 325. To withstand a motion for summary judgment, the non-moving party may not simply rest on the pleadings. Rather, it **must** "make a showing sufficient to establish the existence of [the] element[s] essential to that party's case, and on which that party will bear the burden of proof at trial. . . ." *Id.* at 322. If the non-moving party fails to make this showing, then the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, at 323.

Analysis

Initially, the court finds that Hithon's claims regarding the Albertville position are untimely. Charges must be filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). Failing to file charges within 180 days bars plaintiff from filing such a claim based on this alleged act of discrimination. *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir.1998). Hithon filed her EEOC complaint on January 3, 2001, more than ten months after Phillips was returned to the Albertville position.

Hithon admits that her claim regarding the Albertville position was filed more than 180 days after the violation, but asserts an equitable exception – continuing violation. She argues that the promotion denials in February and July 2000 were part of a series of discriminatory acts. However, the Supreme Court has defined "discrete discriminatory acts" to include "termination, **failure to**

promote, denial of transfer, or refusal to hire." *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 114 (2002) (emphasis added). Each promotion denial "constitute[d] a separate actionable 'unlawful employment practice.'" *Id.* The equitable doctrine of continuing violation does not bridge Tyson's decision in February 2000 regarding the Albertville position to its decision in July 2000 regarding the Oxford position. Hithon's claim regarding the Albertville position is untimely and Tyson is due summary judgment on this claim.

Hithon's claims filed pursuant to 42 U.S.C. § 1981 are also untimely. Hithon commenced this action by filing her complaint on July 25, 2002. The forum state's statute of limitations for personal-injury claims – two years in Alabama – applies to these claims. *Taylor v. Alabama Intertribal Council,* 261 F.3d 1032, 1034 (11th Cir.2001). Tyson returned Phillips to the Albertville position on February 21, 2000. Hithon's complaint was filed more than two years thereafter and, therefore, Hithon's § 1981 claim regarding the Albertville position is beyond the two-year statute of limitations and is barred.

Turning to the burden in this mixed-motive case, Hithon asserts that the Supreme Court's recent decision in *Desert Palace v. Costa,* 539 U.S. 90, 123 S. Ct. 2148 (2003), has eviscerated 30 years of well-established precedent. She argues that the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), no longer exists. (Dkt. #61 at 25). However, nowhere in *Desert Palace* does the Supreme Court even intimate, much less say, that it is overruling, restricting, or clarifying *McDonnell Douglas. Desert Palace* clarifies that a Title VII plaintiff can

establish an employer's liability "using direct **or circumstantial evidence.**" 123 S. Ct. at 2154. The decision does nothing more. To further illustrate this point, this court notes that more than a year after the *Desert Palace* decision, no Eleventh Circuit authority embraces Hithon's interpretation.[5] Accordingly, Hithon's promotion, disparate treatment, and retaliation[6] claims will be evaluated using the familiar, 30-year-old *McDonnell Douglas* framework.

This requires that Hithon first raise an inference of discrimination or retaliation by establishing *a prima facie* case. *Batey v. Stone*, 24 F.3d 1330, 1333 (11th Cir.1994). If a *prima facie* case is established, the burden shifts, and Tyson must proffer a legitimate, nondiscriminatory reason for the adverse employment action. *Meeks v. Computer Assoc. Int'l,* 15 F.3d 1013, 1021 (11th Cir.1994). Hithon can still survive summary judgment by then proffering evidence "to permit a reasonable fact finder to conclude that the employer's proffered non-discriminatory reasons were not what actually motivated its conduct." *Combs v. Plantation Patterns,* 106 F.3d 1519, 1528 (11th Cir.1997); *see also Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir.2000) (en banc); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). This final shift is determinative in this case.

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[5] *See Wilson v. B/E Aerospace, Inc.*, 2004 WL 1459558, *5 (11th Cir. June 30, 2004) (holding *McDonnell Douglas* framework applies to disparate-treatment claims supported by circumstantial evidence).

[6] Although Hithon's complaint refers to "28 U.S.C. § 2000e," instead of "42 U.S.C.," as the basis of her retaliation claim, it is sufficiently clear that she is proceeding under Title VII to put Tyson on notice of this claim.

Assuming *arguendo* that Hithon had established a *prima facie* case, she has not rebutted Tyson's legitimate, nondiscriminatory rationale for selecting Burdick rather than her.[7] An employer's decision as to who is the most qualified for a position is not a decision that should be re-examined by the courts as long as the decisions are not unlawfully motivated. *Alexander v. Fulton County,* 207 F.3d 1303, 1341 (11th Cir.2000). While prior cases suggest that a subjective criterion "cannot be relied upon by an employer seeking to defeat the plaintiff's prima facie case," *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 644 (11th Cir.1998), the Eleventh Circuit has recently clarified that "[a] subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion." *Chapman v. A.I. Transp.,* 229 F.3d 1012, 1034 (11th Cir.2000) (en banc). The issue thus becomes whether Tyson has offered a "clear and reasonably specific factual basis" for Pittard's articulated subjective reason.

In addition to the decision matrix that Pittard created, Tyson points to Burdick's college education and her implementation of the RISE program as making her the superior candidate. Pittard and Tyson made the subjective judgment that these qualifications counted for more than Hithon's experience. The court does not sit to resolve the wisdom or accuracy of Tyson's conclusion. *Rojas v. Florida,* 285 F.3d 1339, 1342 (11th Cir.2002). The only question is whether discriminatory animus or retaliation motivated the decision. *Id.* Hithon's subjective

[7] Consequently, the court does not address whether Hithon has established a *prima facie* case of those claims.

beliefs and self-serving speculation that she was more qualified than Burdick, that Burdick's implementation of the RISE program was not successful, and that Pittard's offer to Carter was a sham are inapposite. Whether the proffered reason is pretext rests upon the employer's provable motive, not the employee's self-serving perception of it. *Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997) (citing *Billet v. CIGNA Corp.*, 940 F.3d 812, 818-22 (3rd Cir. 1991)). Tyson's motion will be granted on these claims.

Hithon also asserts disparate-impact claims pursuant to Title VII and 42 U.S.C. § 1981. She claims that the administration of Tyson's Albertville and Snead complexes are 100% white, while "the corresponding hourly workforce is comprised of 80% minorities." (Dkt. #22 ¶33). Disparate impact discrimination "prohibits neutral employment practices which, while non-discriminatory on their face, visit and adverse disproportionate impact on a statutorily-protected group." *EEOC v. Joe's Stone Crab, Inc.,* 220 F.3d 1263, 1274 (11th Cir.2000). In order to establish a *prima facie* case, "the plaintiff must offer statistical evidence of a kind and degree to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988); *see also Edwards v. Wallace Community College,* 49 F.3d 1517, 1520 (11th Cir.1995) (holding that a "plaintiff must identify a specific employment practice that leads to disparate impact"). Although Hithon's statistics show that a significant majority of the administration is white, she fails to identify **any practice** –through statistics or otherwise – that causes the disparity. *See, e.g., Evans v. McClain, Inc.,* 131 F.3d 957, 963 (11th Cir.1997) (rejecting plaintiff's theory that disparate

impact was shown when employer had only three black supervisors despite employing 650 individuals in eight plants). Moreover, she provides no statistics on the racial make-up of the qualified applicant pool. Therefore, Tyson's motion will granted on this claim.

The claims brought under Alabama law ring a bit hollow but need not be addressed by this court. They will be dismissed without prejudice after the basis for supplemental jurisdiction disappears.

An appropriate order will be entered.

DONE this 23rd day of July, 2004.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

No. 05-579

IN THE

Supreme Court of the United States

LOLA HITHON,

Petitioner,

v.

TYSON FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the test the Eleventh Circuit uses to assess "comparative qualifications" claims—*i.e.*, claims in which a Title VII plaintiff relies solely on his or her superior qualifications to establish that an employer's reasons for a challenged promotion decision are pretextual—conflicts with the test used in other circuits, which uniformly require a showing of *markedly* superior qualifications, and employ a variety of substantively indistinguishable verbal formulations to express this requirement;

Whether this case is an appropriate vehicle for addressing any alleged conflict, in view of the fact that petitioner did not argue that she was more qualified under the criteria the employer actually used to assess candidates, but rather that petitioner was more qualified under the criteria she believes should have been used;

Whether this case is an appropriate vehicle for addressing any alleged conflict based on the fact that an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent states that Barclay's Global Investors, N.A. presently owns more than 10% of the stock of Tyson Foods, Inc. (NYSE: TSN).

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIEF IN OPPOSITION

The petition should be denied because the Eleventh Circuit's unpublished and non-precedential decision raises no important question of federal law warranting this Court's review.

First, there is no conflict in the lower courts over the standard that applies to "comparative qualifications" claims—*i.e.*, claims in which a Title VII plaintiff relies solely on his or her qualifications to establish that an employer's reasons for a challenged promotion decision are a pretext for unlawful discrimination. In such cases, the courts of appeals uniformly require plaintiffs to show that their qualifications were *mark-*

edly superior to those of the selected candidate. Although the lower courts have used different phrases to describe this degree of superiority, the differences in these verbal formulations are wholly semantic; the Eleventh Circuit itself has used many of the phrases petitioners identify as different legal standards to explain why a particular plaintiff failed to satisfy the "slap in the face" test. This is clearly evidenced by the Eleventh Circuit's opinion in this matter, in which the court affirmed the district court's grant of summary judgment, holding that the petitioner "failed to establish a qualification disparity of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over [the petitioner] for the Oxford job." Pet. at 9a.

Further, even if there were any substantive differences, this case is an inappropriate vehicle for addressing the issue: Petitioner's real claim is that she was more qualified under the criteria that she believes *should have been used*, not those that were actually used. Further, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination.

STATEMENT OF THE CASE

Petitioner Lola Hithon instituted this action by filing a Complaint against Tyson Foods, Inc. ("Tyson" or "respondent") in the United States District Court for the Northern District of Alabama, Middle Division, alleging various acts of race discrimination (disparate impact[1] and disparate treat-

[1] In her brief to the Eleventh Circuit, petitioner listed as an issue before the court the district court's decision to dismiss her disparate impact claim, but made no legal argument and provided no analysis regarding the same. The Eleventh Circuit deemed this issue as abandoned, Pet. at 7a, and petitioner did not appeal that decision to this Court.

ment) and retaliation[2] pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981, as well as a number of claims under Alabama state laws.[3]

On April 16, 2004, Tyson filed a Motion for Complete or Partial Summary Judgment. In response, petitioner voluntarily dismissed her claims under Alabama law of intentional infliction of emotional distress, breach of contract and breach of implied covenant of good faith and fair dealing. Pet. at 11a, note 1. The District Court granted Tyson's Motion for Summary Judgment on July 23, 2004, and dismissed, with prejudice, petitioner's remaining claims of race discrimination in violation of Title VII, race discrimination in violation of § 1981, disparate impact, disparate treatment and retaliation.[4]

Petitioner filed a Notice of Appeal with the Eleventh Circuit Court of Appeals on July 30, 2004. On August 12, 2004, The Honorable William M. Acker, Jr. wrote counsel for both parties highlighting the possibility that the United States

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[2] Petitioner originally asserted a retaliation claim arising from an alleged remark made regarding litigation her husband was pursuing against Tyson. The district court granted summary judgment as to petitioner's retaliation claim and petitioner appealed this decision to the Eleventh Circuit. However, petitioner has made no argument in the Petition for a Writ of Certiorari before this Court that the decision regarding her retaliation claim should be reversed.

[3] In addition to alleging claims arising from the July 2000 promotion decision as discussed in the petition before this Court, petitioner originally alleged claims arising from a February 2000 promotion decision at Tyson's Albertville facility. However, the Eleventh Circuit determined that this claim was untimely, Pet. at 6a, and petitioner did not appeal this holding.

[4] The district court also dismissed, without prejudice, petitioner's state law claims of negligent hiring, training, supervision, and retention as the court no longer had a basis for supplemental jurisdiction. Petitioner did not appeal the dismissal of those claims to the Eleventh Circuit, and refiled the same in the Circuit Court of Jefferson County, Alabama.

Supreme Court decision in *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, might have affected the statute of limitations period applicable to petitioner's claims. The letter suggested the parties consider requesting that the Eleventh Circuit grant a limited remand to allow the district court to evaluate the effect, if any, that *Jones* had on the issues in this case. On August 31, 2004, petitioner filed a motion for limited remand with the Eleventh Circuit. On September 8, 2004, petitioner filed a Motion to Reconsider and/or Vacate Order on Summary Judgment with the district court. On October 4, 2004, the district court, believing it did not have jurisdiction, entered an order denying petitioner's Motion for Reconsideration. On October 26, 2004, petitioner filed a second Motion to Remand, which the Eleventh Circuit denied as unnecessary, as the case was already stayed to allow petitioner to renew her Rule 60(b) motion in the district court. On November 30, 2004, petitioner filed a second Motion for Reconsideration and/or Motion to Vacate Order on Summary Judgment Pursuant to FRCP 60(b). The district court denied petitioner's Motion on December 13, 2004, and petitioner filed an Amended Notice of Appeal with the Eleventh Circuit on December 29, 2004. The Eleventh Circuit rejected all of petitioner's arguments, affirming the grant of summary judgment.

In July 1985, petitioner began her employment with Tyson in production as a Sawhand, an hourly position she held until January 1987 when she became an Accounts Payable Clerk. Throughout petitioner's employment with Tyson, she only worked at the Gadsden processing plant, which is a part of the Snead Complex. In February 1989, petitioner was promoted to Frontline Supervisor (another production job) and remained in that role until May 1993, when she became Retention Supervisor/Plant Facilitator, her first human resources related position. In January 1994, petitioner was promoted to Employment Supervisor. In this role, petitioner was responsible for recruiting and hiring the hourly workforce at the

Gadsden plant. Petitioner worked as Employment Supervisor until March 1996, when she returned to the production side of Tyson in the position of Acting Superintendent. From March 1995 until April 1997,[5] petitioner worked as Shift Personnel Manager. Petitioner again returned to the production side of Tyson, serving as Production Coordinator/Shipping Superintendent from April 1997 through May 1998. In May 1998, she became Night Shift Manager, becoming responsible for production at the facility on the night shift. Petitioner was promoted to Plant Personnel Manager, or Plant HR Manager, of the Gadsden plant the following March and held that position at the time she sought the position at issue in this matter.

In early June 2000, the Oxford Complex Manager, John Pittard, posted an open position on Tyson's intranet site—the Oxford Complex Human Resources Manager. In addition to petitioner, three other Tyson employees expressed interest in the position: Jacinta Carter (African American), Lisa Burdick (White) and Ever Higgins[6] (African American).

At the time of her application for the Oxford position, Burdick had worked for Tyson for approximately eight years as a Personnel Clerk, Southeast Regional Insurance Coordinator, Human Resources Trainee (North Alabama Complex),

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[5] Petitioner's resume reflects that she worked as Shift Personnel Manager from March 1995 until April 1997 and as Acting Superintendent from March 1996 until July 1996. Petitioner testified that those jobs did not overlap and that there must be a typographical error on her resume. Petitioner is unsure when she assumed the role of Shift Personnel Manager.

[6] Higgins also pursued litigation against Tyson based on the promotion of Burdick. Her claims were dismissed by the District Court at summary judgment which was affirmed by the Eleventh Circuit. Higgins has also filed a Petition for Writ of Certiorari, *Ever Higgins* v. *Tyson Foods, Inc.*, No. 05-535, presenting the same question as petitioner in this matter. This same question is also presented in *Ash* v. *Tyson Foods, Inc.*, No. 05-379.

Shift Human Resources Manager (Gadsden facility, Snead Complex) and Plant Human Resources Manager (Ashland facility, Oxford Complex). Burdick had a bachelor's degree in marketing, which she received from Jacksonville State University in 1996. In June 2000, when she applied for the Oxford Complex HR Manager position, Burdick was working as the Plant Human Resources Manager at the Ashland facility (Oxford Complex).

Pittard reviewed each applicant's resume and interviewed each of the candidates in person. Pittard also sought references regarding each candidate. Pittard contacted some of Carter's current and past supervisors (David Massey, Complex Manager for South Georgia; Jonathan Andrews, Buena Vista HR Complex Manager; and Don Schaeffer, former Buena Vista Production Supervisor) for their assessments of her performance. Carter received outstanding referrals from each person Pittard contacted. With regard to the other three candidates—petitioner, Higgins, and Burdick—Pittard contacted current managers who were familiar with all three candidates: Wally Taylor, Snead Complex Manager, Mark Waller, former Oxford Complex Manager, and Allen Trotter, Division Training Manager. In addition, Pittard contacted Johnny Whittaker, the Union Business Agent. Pittard asked each individual which candidate he would select for the Oxford Complex HR Manager position of the three candidates with whom they were familiar (petitioner, Higgins, and Burdick). Each stated to Pittard that he would choose Burdick for the position.[7]

Once all of the interviews were completed, Pittard generated a matrix to assess his ranking of the candidates in the categories that he considered relevant to the position, with 1

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[7] Trotter initially said he would choose Higgins to avoid a lawsuit. Pittard told him to put that aside and to choose the best candidate. Trotter then said Burdick was the best candidate.

being the highest ranking and 4 being the lowest. The categories considered by Pittard were education, HR Manager experience,[8] total HR experience,[9] references,[10] community involvement,[11] willingness to relocate, motivation and drive,[12] presence,[13] and relationship with the union.[14] The matrix was as follows:

	Ed	HR Mgr Exp	Tot HR Exp	Ref	Comm Inv	Loc in area	Mot Drive	Presence	Union Rel.
Petitioner	3	4	2	4	3	3	3	4	3
Higgins	2	1	1	3	4	3	4	3	4
Burdick	2	2	3	2	1	1	2	2	2
Carter	1	3	4	1	2	2	1	1	1

Pittard decided that Carter was the most qualified for the position because she had a dual college degree; she was bilingual; she had great successes in her current plant; she had

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[8] This category ranked years as a Plant HR Manager.

[9] This category ranked the total number of years each candidate worked in human resources. Pittard determined this ranking by examining the candidates' resumes.

[10] Carter's rating was based upon Pittard's conversation with her supervisors. Petitioner's, Higgins' and Burdick's ratings were based upon Pittard's conversations with Taylor, Waller, Trotter and Whittaker as well as his own knowledge of their work history and performance.

[11] Pittard ranked the candidates' community involvement based upon their interview discussion of community involvement.

[12] This ranking was based on the enthusiasm of the candidate in the interview and their display during the interview of self-motivation in their current position.

[13] This ranking was based on the candidates' ability to stay focused and on track while responding to questions during the interview, answering the questions asked, answering the questions accurately, and presenting themselves appropriately during the interview process.

[14] Petitioner's, Higgins', and Burdick's ratings were based on Pittard's conversations with union representative Johnny Whittaker and Carter's rating was based upon Pittard's conversation with her supervisors and her interview.

high references; she was willing to relocate; she exhibited a high degree of enthusiasm and motivation for the job; and she interviewed extremely well. During her interview Carter gave specific answers to Pittard's questions and gave descriptions of programs that she initiated in her current role as Plant HR Manager. Pittard also felt that Carter was innovative because she developed solutions to tough problems.

Pittard informed Schaeffer that he wanted to offer Carter the position. Schaeffer asked Pittard if he would postpone the announcement of his selection to allow Carter to interview for the Pine Bluff, Arkansas, Complex HR Manager position. Pittard agreed not to announce his decision until after Carter interviewed for the Pine Bluff position. Pittard called Carter that day and told her that the job was hers, but that he had been asked to wait on the official announcement and allow Carter to interview for the Pine Bluff position. Pittard told Carter not to let the people at Pine Bluff talk her out of taking the Oxford position. Carter interviewed in Pine Bluff for the Complex HR Manager position with the understanding that she had already been offered the same position in the Oxford Complex. Carter was offered and decided to accept the Pine Bluff position. Upon learning of Carter's decision to accept the Pine Bluff position, Pittard's second choice for the Oxford Complex HR Manager was Burdick.

During this same time period, but before petitioner became aware of the final Oxford decision, petitioner interviewed for and was offered the position of Plant Manager of the Cleveland, Mississippi plant, the highest ranking position in the plant. Petitioner decided to decline the opportunity to become Plant Manager at the Cleveland plant, primarily because she did not want to relocate her family.

Upon learning of Pittard's decision to promote Burdick, petitioner e-mailed Don Schaeffer and also spoke with Cathy Clark (African-American female and EEO/AA Director) regarding her disappointment in the decision. Petitioner met

with Schaeffer about the promotion decision and was informed of the criteria used by Pittard and the scores of the candidates. Petitioner also e-mailed Dan Serrano about Pittard's decision to promote Burdick and was informed by Serrano that one of the primary reason for the decision was Burdick's exemplary implementation of the RISE program.[15] In addition, Serrano informed petitioner that Carter was originally offered the position.

The next day, petitioner e-mailed Serrano, Clark, Michelle Eisner, and Carl Johnson regarding her dissatisfaction with the decision. Petitioner's letter explained her disagreement with the criteria used for making the selection. On September 5, 2000, petitioner sent a letter to Clark, Eisner, Johnson and LaDonna Bornhoft, lodging an official complaint regarding the decision and alleging that the categories used for the decision were designed to play to Burdick's attributes.

After receiving petitioner's formal complaint, Clark notified Eisner, Senior Vice President of Human Resources, and told her she (Clark) would investigate the complaint. During the course of her investigation, Clark interviewed petitioner, Higgins, Pittard, and Trotter. In addition to the interviews, Clark also reviewed petitioner's internal complaint, the job summary, and the personnel files and resumes of the three remaining candidates, petitioner, Higgins, and Burdick. During Pittard's interview with Clark, he told her that all of the candidates were good, and that he originally offered Carter the position, but she declined it. Pittard expressed disappointment that Carter did not accept the position. He further explained that he selected Carter because she met the requirements for what he was seeking in the position. Pittard also

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[15] The RISE program was a program Burdick implemented in an effort to reduce turnover at the plant where Burdick worked as the HR manager. In the first year of the program, Burdick successfully reduced the turnover rate from 250% to 114%.

stated that once Carter declined the position, he felt that, of the remaining candidates, Burdick was the best candidate because she had done a very good job as Ashland's Human Resources Manager and the quality of her work was good. Pittard also discussed a few of his concerns relative to petitioner including his belief that petitioner was better at operations than human resources and would make an outstanding plant manager for Tyson. Pittard also felt that petitioner had some shortcomings in terms of her interactions with Tyson team members.

After Clark reported the substance of the interviews to Eisner, Eisner instructed her to coordinate a panel review of the promotion decision. Eisner further instructed her to get a diverse group to participate on the panel and to engage an outside firm to assist in the review process. In determining the make-up of the panel, Clark looked at corporate human resources directors and selected a diverse group of candidates. She selected an African-American male, Leonard Parks, and Peggy Roles, a white female, both of whom were divisional HR Managers. She also selected David Mantooth, VP of Operations (Native American male) and Eugene Eggman, another divisional HR Manager (white male). In preparation for the review, Clark provided the panelists with the names of the candidates and a description of the Complex HR Manager position. Fortune Personnel Consulting, a firm based out of Huntsville, Alabama, was engaged by Tyson to facilitate the review process. David Harris, President of Fortune, was personally responsible for overseeing the review.

Clark notified petitioner that she would have a second interview (as a part of the review) for the Oxford position. Clark further explained that an interview process called Topgrading (developed by Harris) was going to be utilized and that the questions were designed to elicit the candidates' assessments of their own competencies in the following areas: intellectual, personal, interpersonal, management, leadership,

and motivational. Clark also notified petitioner of the names of the panelists and told her that the entire interview process should take three and a half hours. Higgins and Burdick were also interviewed as a part of the panel's review.

Prior to the interviews, the panelists met with Harris, the facilitator of the interviews, and he discussed with them the interview process and the questions that would be asked of each candidate. Each panelist was also given a copy of the candidates' resumes to review before their interviews. In addition, before the interviews began, Harris informed the panel that it was the panel's charge to make the best selection for the position and that whomever the panel selected would be placed in the position. The individual candidates were not discussed among the panel members prior to the interviews. Harris explained to petitioner at the beginning of her interview that he would ask the questions and that the panelists would take notes as she responded. During the interviews, each candidate was asked the same questions. Harris asked the majority of the questions and occasionally one of the panelists would ask a follow-up question for clarification or elaboration. At the end of each candidate's interview, Harris led a discussion where the panel reviewed their opinions of the candidate's strengths and weaknesses.

After the interviews, each panelist had ranked the candidates in the following manner:

Mantooth	Roles	Eggman	Parks
1. Burdick	1. Burdick	1. Burdick	1. Higgins[16]
2. Higgins	2. Higgins	2. Higgins	2. Burdick
3. Petitioner	3. Petitioner	3. Petitioner	3. Petitioner

[16] While Parks believed that Higgins should have been the successful candidate because of her seniority, he believed that Higgins and Burdick were equally qualified, and that Burdick was more qualified than petitioner.

All of the panelists, including Parks (African American) ranked petitioner as their last choice for the promotion.

After the interviews were completed, the panelists formulated a summary of the candidates' strengths and weaknesses based on the interviews. The panel ultimately recommended that Burdick was the candidate who best fit the Oxford Complex HRM position.

REASONS FOR DENYING THE WRIT

There is no split in the circuits on the question posed in the petition. Nor is there any other reason to review the lower court's fact-bound determinations, which are based on settled legal principles and are set forth in a terse, unpublished and non-precedential opinion. Accordingly, the petition should be denied.

ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARISONS OF QUALIFICATIONS.

In her petition before this Court, petitioner does not present any argument or analysis regarding the alleged "well-established inter-circuit conflict" regarding the standard to be applied in "comparative qualifications" cases, relying on the *Ash* and *Higgins* petitions regarding the same. Pet. at 7. As discussed at length in respondent's oppositions to these petitions, there is no split in the circuits as to the question posed in these petitions.

Following the guidance of this Court, the courts of appeals uniformly recognize that a Title VII plaintiff who seeks to establish pretext based solely on evidence of comparative qualifications must show that his or her qualifications were *markedly* superior to those of the candidate selected for a job or promotion. Although the lower courts have used different phrases to capture this concept, there is no meaningful difference between their various verbal formulations.

Even if there were any substantive difference, this case is an inappropriate vehicle for addressing the issue, because petitioner did not in fact claim that she was more qualified under the criteria that were actually used in this case. Instead, she claims she was more qualified under the standards that she believes *should have been used*, which is not a superior qualifications claim. Further, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination.

1. All of the courts of appeals that have addressed the question have concluded that a factfinder cannot base a finding of pretext solely on evidence of comparative qualifications unless the plaintiff establishes that his or her qualifications were markedly superior to those of the candidate chosen. This requirement is compelled by this Court's recognition that Title VII "was not intended to diminish traditional management prerogatives," *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981). Accordingly, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not itself expose him to Title VII liability, although this may be probative of... pretext." *Id.* (internal quotation marks and citations omitted). See also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 (1989) ("the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color") (internal quotation marks and citations omitted).

In compliance with these instructions, the courts of appeal have sought to ensure that courts and juries do not act as "super personnel departments" that "second guess" good faith business judgments. Because it is in the employer's own interest to select the most qualified applicant, an employer's judgment about qualifications is assumed to be made in good faith.

As the First Circuit has explained:

> in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext. . . . This result follows from a form of the business judgment rule. . . . Qualifications are notoriously hard to judge and, in a disparate treatment case, more must be shown than that the employer made an unwise personnel decision by promoting "X" ahead of "Y." . . . In other words, subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong- headed, was anything more than a garden-variety mistake in corporate judgment. . . .

Rathbun v. *Autozone*, 361 F.3d 62, 74 (1st Cir. 2004) (citations and internal quotations omitted); see also *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) ("the court must respect the employer's unfettered discretion to choose among qualified candidates . . . (and not to act as a super personnel department that second guesses employers' business judgments)") (citation omitted); *Scott* v. *University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998) ("[d]isagreements over which applicant is more qualified are employment decisions in which we will not engage in the practice of second-guessing"); *Peters* v. *Lieuallen*, 746 F.2d 1390, 1393 (6th Cir. 1984) ("[t]he fact that a court may think that an employer misjudged the qualifications of an applicant does not in itself establish a Title VII violation."); *Millbrook* v. *IBP*, 280 F.3d 1169, 1181 (7th Cir. 2002) ("a court's role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employer's business judgments."); *Bullington* v. *United Air Lines*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) ("courts, when analyzing the pretext issue, do not sit as super-personnel departments free to second-guess the business judgment of the employer"); *Fishbach* v. *D.C. Dept. of Correc.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("the court must respect the employer's unfettered discretion to choose among qualified candidates and [re-

member that the court] does not sit as a super-personnel department that reexamines an entities' business decisions").

Accordingly, to prevent second-guessing of presumptively good faith business decisions, the courts of appeals have uniformly insisted that plaintiffs who seek to show pretext based solely on a comparison of qualifications must demonstrate that their own qualifications were markedly superior. The lower courts have expressed this requirement in different ways, but their expressions all serve the same purpose, and do not differ in substance: First Circuit—plaintiff's "qualifications must be "**obviously superior**," *Rathbun*, 361 F.3d at 75; Second Circuit—"plaintiff's credentials . . . [must] be **so superior** . . . that 'no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected," *Byrnie*, 243 F.3d at 103; Fourth Circuit—"qualifications so **plainly superior** that the employer could not have preferred another candidate," *Dennis* v. *Columbia Collecton Med. Ctr.*, 290 F.3d 639, 648 n.4 (4th Cir. 2002); Fifth Circuit—"comparison of . . . qualifications does not reveal any **glaring distinction** that would support" a better qualified finding, *Scott*, 148 F.3d at 509; Seventh Circuit—"differences are **so favorable** to . . . plaintiff **that there can be no dispute among reasonable persons** of impartial judgment that the plaintiff was clearly better qualified," *Millbrook*, 280 F.3d at 1179; Ninth Circuit—plaintiff's qualifications must be "**clearly superior**," *Odima* v. *Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995); Tenth Circuit—"the disparity in qualifications must be **overwhelming**," *Bullington* v. *United Air Lines*, 186 F.3d 1301, 1319 (10th Cir. 1999); Eleventh Circuit—"disparities in qualifications . . . of **such weight and significance that no reasonable person**, in the exercise of **impartial judgment**, could have chosen the candidate selected over the plaintiff," *Lee* v. *GTE Florida*, 226 F.3d 1249, 1254 (11th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001); D.C. Circuit—plaintiff must be "**significantly better quali-**

fied," *Aka* v. *Washington Hospital Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (emphasis supplied).

2. Petitioner attempts to manufacture a conflict from variations in the foregoing verbal formulas. As discussed at length in Respondent's opposition to the *Ash* and *Higgins* petitions, there is no basis for claiming that there is "a well-established inter-circuit conflict." Pet. at 7. In fact, as a linguistic matter, there is no substantive difference between the two formulations. To say that plaintiff's qualifications are "clearly superior" simply means that the superiority of those qualifications is "without doubt or question." *Webster's Third New International Dictionary* (1971) at 420 (defining "clearly"). Although more colorful, the "slap in the face" test requires no more than this. In the Fifth Circuit, where "slap in the face" originated, Judge Jolly has explained that the phrase:

> is simply a colloquial expression that we have utilized to bring some degree of understanding of the level of disparity in qualifications required to create an inference of intentional discrimination. In its essence, the phrase should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.

Deines v. *Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999).[17] In other words, "slap

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[17] The phrase had its origin in *Odom* v. *Frank*, 3 F.3d 839, 847 (5th Cir. 1993), where the Fifth Circuit explained that: "unless the disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise. . . ." Petitioner would turn an expression of judicial humility and restraint into an intrusive rant—the use of the phrase in its judicial context is incapable of such an extreme make-over.

in the face" should be understood to mean that there can be no "doubt or question" about the superiority of plaintiff's qualifications—*i.e.*, that they are "clearly superior." *Raad* v. *Fairbanks North Star Borough School District*, 323 F.3d 1185, 1194 (9th Cir. 2003).

Indeed, the most telling evidence that the standards are indistinguishable is the decision in *Lee*, the case in which the Eleventh Circuit first adopted the "slap in the face" phrase. See 226 F.3d at 1254. Applying that test to the evidence before it, the Eleventh Circuit concluded that the plaintiff "did not meet her burden [under the 'slap in the face' test] of establishing" pretext because her "evidence fell far short of establishing that she was *clearly more qualified* for the position than" the candidate selected. *Id.* at 1255 (emphasis added). Thus, the Eleventh Circuit itself has equated "slap in the face" with "clearly more qualified," which is identical to "clearly superior." Indeed, in this case, the Eleventh Circuit affirmed the district court's grant of summary judgment by stating that the petitioner "failed to establish a qualification disparity of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over [the petitioner] for the Oxford job." Pet. at 9a. This once again confirms that it views the "slap in the face" test as interchangeable with the formulations employed by other circuits.

b. Petitioner's general and unsupported statement that the Eleventh Circuit standard "has proven in practice to be impossible to satisfy," Pet. at 9, is similarly misleading. This claim ignores the realities of the court system and presupposes that published opinions represent the entire universe of cases that have involved the issue at hand. Obviously, in those cases where a court has concluded that sufficient qualifications evidence was presented by the plaintiff to survive a summary judgment or a motion for judgment as a matter of law, the result would be the issuance of a non-appealable

order. Undoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient but there is no published opinion reflecting that holding because the cases have settled, were tried to verdict without appeal or were otherwise resolved without an appeal or published decision.

3. Even if there was a conflict in the circuits over the evidentiary standard for proving pretext based solely on a plaintiff's superior qualifications—and there manifestly is not—this case would not be the proper vehicle for resolving such a conflict. Petitioner's claim below, and before this Court, is *not* that she was more qualified under the criteria that the decision-maker actually used. Petitioner asserted to the District Court, the Eleventh Circuit, and this Court, that she was the most qualified individual for the position based solely on her experience. Pet. at 18a. However, this argument ignores the actual criteria used by Pittard: education, HR Manager experience, total human resources experience, references, community involvement, willingness to relocate, motivation and drive, presence, and relationship with the union.

This disagreement over which decisional criteria were or should have been used to measure the qualifications of the respective job applicants precludes consideration of the first question petitioner seeks to raise. If Pittard in fact applied the criteria he said he applied, then petitioner was not better qualified, let alone markedly so, and the question of superior qualifications is not presented at all.

Moreover, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination. All four of the panelists determined that Burdick was the most qualified candidate for the position, and all four of the panelists ranked petitioner as the least qualified of all of the candidates. Even

if petitioner's alleged evidence regarding qualifications establishes pretext in Pittard's decision to promote Burdick (which it does not), it does not negate the finding of the independent review committee. As such, this case is not an appropriate vehicle for addressing any conflict regarding "comparative qualifications" claims.

4. Further, petitioner's assertion that the "reasonable person" standard applied by the Eleventh Circuit in this matter, a standard that is equivalent to the "slap you in the face" standard, requires the employee to "demonstrate that the employer's action would fail the rational basis test" is entirely erroneous. Pet. at p. 9. There is no logical basis for petitioner's assertion that a "reasonable person" standard is the same as a "rational basis test."

This Court has applied a rational basis test in determining whether state action violates the Fourteenth Amendment. See e.g., *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) (determining that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational); *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 83 (2000)(holding that "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.")[18] However, this matter does not involve state action, and the cases cited by petitioner in support of her "rational basis test" argument are entirely inapplicable to this matter.

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[18] In cases involving gender or race discrimination, states must establish a "tighter fit" than a rational basis, and the state action is "constitutional only if [it] is narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.*, v. *Pena*, 515 U.S. 200, 227 (1995).

Moreover, this Court has repeatedly applied a "reasonable person" standard to many applications of discrimination law. See e.g., *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 147 (2004)(stating that in order to establish a hostile environment constructive discharge claim, plaintiff "must show working conditions so intolerable that a **reasonable person** would have felt compelled to resign."); *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356, 361 (2001) (restating that the ADA requires employers to "make **reasonable** accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability")(quoting 42 U.S.C. § 12112(b)(5)(A)); *Clark County School District* v. *Breeden*, 532 U.S. 268, 270, 271(2001) (reversing the Court of Appeals for the Ninth Circuit's decision that the employee had established a claim of retaliation under Title VII, holding that "[n]o **reasonable person** could have believed that the single incident [alleged by the employee] violated Title VII."); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 765 (1998)(holding that when no tangible employment action is taken, the employer affirmative defense is comprised of two elements: "(a) that the employer exercised **reasonable** care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee **unreasonably** failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."); *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)(holding that "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment—an environment that a **reasonable person** would find hostile or abusive—is beyond Title VII's purview.")(citing *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986)). It is clear that viewing evidence from a "reasonable person" perspective is consistent with this Court's holdings in many areas of discrimination law and is not a violation of the Equal Protection Clause as asserted by petitioner.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the Petition.

Respectfully submitted,

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